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USAHASAMA SPNB-LTAT SDN BHD v. ABI CONSTRUCTION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[ORIGINATING SUMMONS NO: WA-24C(ARB)-1-01-2016]
29 APRIL 2016

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ARBITRATION: *Arbitrator – Jurisdiction – Whether notice of arbitration premature – Terms in contract – Dispute to be referred to officer for decision before reference to arbitration – Whether a mandatory requirement – Whether requirement waived – Whether arbitrator had jurisdiction to hear reference*

C

CONTRACT: *Terms – Condition precedent – Dispute to be referred to officer for decision before reference to arbitration – Whether parties contractually agreed to pre-condition – Whether meetings and negotiations between parties tantamounted to reference under contract – Whether requirement waived by silence*

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The plaintiff, as the employer, entered into a PWD 203 contract with the defendant, the contractor, to perform certain works subject to the terms and conditions therein. A dispute arose between the parties and the plaintiff terminated the contract by its letter dated 19 February 2008. The defendant proceeded to arbitration by issuing a notice of arbitration dated 12 February 2014 which was fixed for preliminary meeting on 19 May 2015. Before the preliminary meeting, the plaintiff informed the arbitrator, *via* a letter, that in accordance with cl. 54 of the contract, the defendant would have to first refer the dispute or differences to the officer named in the appendix for a decision before the dispute was referred to arbitration. The plaintiff stated that, as such, the notice of arbitration dated 12 February 2014 was premature and accordingly, the arbitrator had no jurisdiction to decide the dispute between the parties. The arbitrator dismissed the plaintiff's application, holding that he had the jurisdiction to decide the dispute between the parties. Dissatisfied, the plaintiff appealed under s. 18(8) of the Arbitration Act 2005 ('the AA'). It was the plaintiff's contention that the defendant would have to first refer the dispute to the Superintending Officer ('SO') who is the Managing Director of the plaintiff before the dispute was referred to the arbitration in accordance with cl. 54 of the contract, which was mandatory. The defendant, on the other hand, contended that the various letters between the parties, both before and after the notice of arbitration, were sufficient compliance in substance with the requirement of cl. 54 of the contract. The defendant further contended that, in any event, the plaintiff had waived the requirement and was estopped from objecting on that ground as it had not raised it at the earliest opportunity.

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Held (allowing appeal):

(1) A precondition or a condition precedent is a condition that has to be fulfilled before a right accrues. Once it is contractually agreed upon, the parties should be held to the bargain unless such an agreement is

prohibited by law or that it is too vague for enforcement. It had not been suggested that there was a statutory prohibition in this case. (para 17)

(2) Both parties had agreed contractually to a precondition to be fulfilled before there could be a valid reference to arbitration. The requirement that the contractor must first refer the dispute or difference to the employer's SO, the Managing Director of the plaintiff, for a decision before the dispute is referred to the arbitration in accordance with cls. 54(a) and (b) of the contract was clearly in the form of a condition precedent to cl. 54(c). Until and unless the contractually agreed conditions were fulfilled, the arbitrator concerned could not assume jurisdiction. There was no good reason not to hold them to the bargain struck. (para 18)

(3) Where there was a sufficiently clear reference to the SO for a decision before proceeding to arbitration, as in the nature of a precondition or condition precedent, both the intention of the parties captured in the clear words of cls. 54(a) and (b) as well as public interest would operate to constrain the courts to enforce such a clause. (para 29)

(4) In determining whether the referrals by way of letters written to try to resolve the dispute or difference were sufficient compliance with cls. 4(a) and (b), one must be confined to the letters written before the reference to arbitration *via* the notice to arbitrate. There must be sufficient specificity with reference to the disputes or differences and an invocation of the said clause calling for nothing short of a decision. (paras 32 & 34)

(5) The various letters and chiefly, the letter of 3 September 2010 from the defendant addressed to the plaintiff, instead of to the SO, captioned 'Draft of Final Account Statement' did not come close to being a specific reference under cl. 54(a) of the contract though by reading it, one might have a rough idea as to the nature of the dispute. The defendant did impress upon the plaintiff why the termination of the contract was invalid and that it was not agreeable to the draft final account but fell short of invoking cl. 54(a) in requiring the SO to make a decision within 45 days of the reference to him. Evidence of a series of meetings and negotiations between the parties did not tantamount to a reference under cl. 54(a) of the contract. (paras 37 & 38)

(6) Silence, by itself, could not be interpreted as a waiver. Section 18(3) of the AA provides that 'a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence'. There can be no estoppels against a statute. The plaintiff had raised the jurisdictional challenge at the first preliminary meeting and in the circumstances, it was timeously and promptly raised. (paras 39, 41 & 42)

(7) Time did not run from the date the application on the preliminary issue was made before the arbitrator on 2 June 2015 until the expiry of the two trances of 45 days referred to in cl. 54(c) of the contract provided that the relevant notice under cl. 54(a) was issued by the claimant to the plaintiff within 14 days from the date of judgment. The claimant/defendant may have to resort to s. 45 of the AA with respect to applying to the High Court for an extension of time to commence the arbitration, if necessary. (para 45)

Case(s) referred to:

Araprop Development Sdn Bhd v. Leong Chee Kong & Anor [2008] 1 CLJ 135 CA ***(refd)***

Central Trading & Exports Ltd v. Fioralba Shipping Company The Kalisti [2015] 1 All ER (Comm) 580 ***(refd)***

Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan [2012] EWHC 3518 (Comm) ***(refd)***

Eagle Eye Capital Sdn Bhd v. Roselina Tan Sri Mahmood [2011] 1 LNS 234 HC ***(refd)***

Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd [2014] EWHC 2104 (comm) ***(refd)***

International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and Another [2014] 1 SLR 130 ***(refd)***

JMB Silverpark Sdn Bhd v. Silverpark Sdn Bhd & Anor [2012] 1 LNS 1082 HC ***(refd)***

Kok Hoong v. Leong Cheong Kweng Mines Ltd [1963] 1 LNS 61 PC ***(refd)***

Penta-Ocean Construction Co Ltd v. Penang Development Corporation [2003] 1 LNS 8 HC ***(refd)***

Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications [2010] 5 CLJ 32 CA ***(refd)***

Total Future Sdn Bhd v. Government of Malaysia & Ors [2013] 9 MLJ 288 ***(refd)***

United Malayan Banking Corporation Sdn Bhd v. Syarikat Perumahan Luas Sdn Bhd [1998] 3 MLJ 352b ***(refd)***

United Group Rail Services Limited v. Rail Corporation New South Wales [2009] NSWCA 177 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 18(3), (8), 45

Limitation Act 1953, s. 30

Arbitration Act 1996 [UK], s. 67

Other source(s) referred to:

Sundra Rajoo & WSW Davidson, *The Arbitration Act 2005*, Sweet & Maxwell Asia 2007, p 89

The Malaysia PWD Form of Construction Contract, 2nd edn, Sweet & Maxwell Asia 2011, p 154

For the plaintiff - T Baskaran & S Suhanthi; M/s Zul Rafique & Partners
For the defendant - Mohd Irzan Iswatt Mohd Noor; M/s Haniff Khatri

Reported by S Barathi

JUDGMENT

Lee Swee Seng J:

[1] The plaintiff, as employer, had entered into a PWD 203 contract with the defendant, as contractor. Under the contract dated 17 February 2006, the defendant agreed to perform certain works, more particularly described as "Cadangan Pembangunan Keperluan Perumahan Anggota Tentera dan Kakitangan Awam, Kem Sungai Besi, Kuala Lumpur-Kerja Bangunan di Zon C" (the works), for the plaintiff, subject to the terms and conditions therein. A dispute arose between the parties. The plaintiff terminated the contract by its letter dated 19 February 2008. The defendant as claimant proceeded to arbitration by issuing a notice of arbitration dated 12 February 2014 to the plaintiff. The arbitrator appointed, Mr Bhag Singh, proceeded to fix a date for the preliminary meeting on 19 May 2015.

Problem

[2] Before the preliminary meeting, the plaintiff wrote to the arbitrator, which letter was copied to the defendant's solicitors, to state that in accordance with cl. 54 of the contract, the defendant would first have to refer the dispute or differences to the officer named in the Appendix, the Managing Director of the plaintiff, for a decision before the dispute is referred to arbitration. As such, the notice of arbitration dated 12 February 2014 is premature and accordingly the arbitrator has no jurisdiction to decide the dispute between the parties.

[3] The solicitors for the plaintiff also notified the arbitrator that they will be making an application under s. 18 of the Arbitration Act 2005 and proposed to take directions in this regard at the preliminary meeting.

[4] On 24 September 2015, a hearing was held by the arbitrator in respect of the plaintiff's application. By a decision dated 7 December 2015, the arbitrator held that he did have the jurisdiction to decide the dispute between the parties and he dismissed the plaintiff's application.

Prayer

[5] The plaintiff being dissatisfied with the decision of the said arbitrator, appealed to this court under s. 18(8) of the Arbitration Act 2005.

[6] The plaintiff contended that the defendant would first have to refer the dispute or differences to the Superintending Officer ("S.O.") who is the Managing Director of the plaintiff for a decision before the dispute is referred to arbitration in accordance with cl. 54 of the contract. It argued that no dispute or differences were ever referred to the Managing Director of the plaintiff or his predecessor as required under cl. 54. It was submitted by the plaintiff that the condition found in cl. 54(a) and (b) are mandatory, in the form of a precondition or a condition precedent, which must be fulfilled before the arbitrator has jurisdiction to hear the dispute between the parties.

[7] The defendant, on the other hand, contended that the various letters between the parties, both before and after the notice of arbitration, are sufficient compliance in substance, directly or indirectly, with the requirement of cl. 54 of the contract. In any event the plaintiff had waived the requirement and is estopped from objecting on that ground, as it had not raised it at the earliest opportunity when it received the notice of arbitration on 13 February 2014 and had a few rounds of without prejudice negotiations with the defendant even after the preliminary meeting before an earlier arbitrator appointed before the current arbitrator Mr Bhag Singh.

Principles

[8] Clause 54 of the contract reads:

54. Arbitration

Reference to S.O. for a decision.

(a) If any dispute shall arise between the Government and the Contractor, either during the progress or after completion of the Works, or after the determination of the Contractor's employment, or breach of this Contract, as to:

(i) The construction of this Contract, or

(ii) Any matter or thing of whatsoever nature arising under this Contract, or

(iii) The withholding by the S.O. of any certificate to which the Contractor may claim to be entitled, then such dispute or difference shall be referred to the S.O. S.O.'s decision to be binding until completion of Works.

(b) The S.O.'s decision which is to be in writing shall subject to sub-clause (e) hereof be binding on the parties until the completion of the Works and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence whether or not notice of dissatisfaction is given by him.

Reference to arbitration.

(c) If the S.O. fails to give a decision for a period of forty-five (45) days after being requested to do so by the Contractor of if the Contractor be dissatisfied with any decision of the S.O., then in any such case the Contractor may within forty-five (45) days after the expiration of forty-five (45) days after he had made his request to the S.O., or forty-five (45) days after receiving the decision of the S.O., as the case may be, require that such dispute or difference be referred to arbitration and final decision of a person to be agreed between parties to act as the Arbitrator. The arbitration shall be held at the Regional Centre for Arbitration at Kuala Lumpur, using the facilities and assistance available at the Centre.

Reference to arbitration shall not be commenced until after completion of Works.

(d) Such reference, except on any difference or dispute under Clause 52 hereof shall not be commenced until after the completion or alleged completion of the Works or determination or alleged determination of the Contractor's employment under this contract, or abandonment of the Works, unless with the written consent of the Government and the Contractor.

Power of the Arbitrator.

(e) The Arbitrator shall have power to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given in accordance with sub-clause (c) aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given.

Discretion of Arbitrator in respect of costs and award.

(f) Upon every or any such reference the costs of such incidental to the reference and award shall be in the discretion of the Arbitrator who may determine the amount thereof, or direct the amount to be taxed as between solicitor and client or as between party and party, and shall direct by whom and to whom and in what manner the same be borne and paid.

Award of Arbitrator is final.

(g) The award of the Arbitrator shall be final and binding on the parties.

Appointer of Arbitrator.

(h) In the event of the death of the Arbitrator or his unwillingness or inability to act, then the Government and the Contractor upon agreement shall appoint another person to act as the Arbitrator, and in the event the Government and the Contractor failing to agree on the appointment of an Arbitrator, an Arbitrator shall be appointed by the person named in the Appendix to these Conditions.

Arbitration Act 1952.

(i) In this condition, "reference" shall be deemed to be reference to arbitration within the meaning of the Arbitration Act 1952 (Revised – 1972).

[9] Under the contract, any reference to the "Government" shall be read as a reference to the plaintiff and that the SO is the Managing Director of the plaintiff.

[10] Section 18 of the Arbitration Act 2005 provides as follows:

Competence of arbitral tribunal to rule on its jurisdiction:

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

(2) For the purposes of subsection (1):

(a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and

(b) a decision by the arbitral tribunal that the agreement is null and void shall not *ipso jure* entail the invalidity of the arbitration clause.

(3) **A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.**

(4) **A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.**

(5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.

(7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.

(8) Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of that ruling appeal to the High Court to decide the matter.

(9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

(10) No appeal shall lie against the decision of the High Court under subsection (8). (emphasis added)

Whether An Appeal Under s. 18(8) Of The Arbitration Act 2005 Is By Way Of A Rehearing Rather Than A Review Of The Arbitrator's Decision On Jurisdiction

[11] The plaintiff submitted that a challenge to the decision of the arbitrator is by way of an appeal to this court and not by way of a reference on a question of law or by way of a review and as such, being an appeal under s. 18(8), it is by way of a rehearing of the issues by this court and not merely a review of the arbitrator's decision. There is merits for this contention and supported to by some authorities of high standing from other jurisdictions having a similar legislation.

[12] Learned counsel for the plaintiff, Mr T Baskaran, referred to the Supreme Court of England's decision in *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2012] EWHC 3518 (Comm) where it was observed as follows:

21 Moreover, I have to say that I find it difficult to understand exactly what Miss Heilbron had in mind when submitting that the court should accord deference to the tribunal's conclusions, particularly in view of the fact that she asserted that the principle was flexible in its application. If it meant no more than that the court should have regard to the tribunal's reasoning in reaching its own conclusion, I should have little difficulty with it, since the tribunal's reasons will almost invariably be before the court and will carry as much persuasive weight as their cogency gives them. That is not, however, what I understood her to mean; since it was essential to her argument that the court should at least accord great weight to the tribunal's conclusions unless they are clearly wrong. However, as became clear in the course of argument, it is impossible to formulate any satisfactory principle that falls somewhere between a limited review akin to that which the court undertakes when reviewing the exercise of a judicial discretion and a full rehearing, not to mention one that is also capable of flexibility in its application. Moreover, for the court to defer to the tribunal's conclusions in the manner suggested by Miss Heilbron when it is required to decide whether a particular state of affairs has been proved would be to give the award a status which the proceedings themselves call into question. *It is for similar reason that our courts have consistently held that proceedings challenging the jurisdiction of an arbitral tribunal under section 67 of the Arbitration Act 1996 involve a full rehearing of the issues and not merely a review of the arbitrators own decision.* (emphasis added)

[13] That approach was followed by the High Court of England in *Central Trading & Exports Ltd v. Fioralba Shipping Company the Kalisti* [2015] 1 All ER (Comm) 580 as follows:

[9] *A series of first instance cases has made clear that a s 67 challenge involves a rehearing (and not merely a review) of the issue of jurisdiction, so that the court must decide that issue for itself. It is not confined to a review of the arbitrators' reasoning, but effectively starts again. That approach has been confirmed by the Supreme Court in Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2011] 1 All ER 485, [2011] 1 AC 763, which also makes clear that the decision and reasoning of the arbitrators is not entitled to any particular status or weight, although (depending on its cogency) that reasoning will inform and be of interest to the court. (emphasis added)

[14] Section 67 of the English Arbitration Act 1996 provides as follows:

Challenging the award: substantive jurisdiction.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court:

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

[15] Whilst the word "application" is used in the English Arbitration Act 1996, our section is even more emphatic as it uses the word "appeal" in s. 18(8) of the Arbitration Act 2005.

[16] This court would follow the same approach as if hearing the issue afresh and uninfluenced by the prior decision of the arbitrator either way, respecting always the cogency of reasons given by the arbitrator but unrestrained by what has undergirded his decision.

Whether A Reference To The SO Under Clause 54(a) And (b) Of The Contract Is A Precondition Or A Condition Precedent To Arbitration Under Clause 54(c) Of The Contract

[17] A precondition or a condition precedent is a condition that has to be fulfilled before a right accrues. Once it is contractually agreed upon, the parties should be held to the bargain unless such an agreement is prohibited by law or that it is too vague for enforcement. Here it has not been suggested that there is a statutory prohibition against it.

[18] Both parties have agreed contractually to a precondition to be fulfilled before there can be a valid reference to arbitration. An arbitrator's jurisdiction is contractually agreed by both parties to an arbitration agreement. In a very real sense, until and unless the contractually agreed conditions are fulfilled for the reference to arbitration, the arbitrator concerned cannot assume jurisdiction. There is no good reason not to hold them to the bargain struck. The requirement that the contractor must first refer the dispute or difference to the employer's SO who is Dato' Dr Sr Kamarul Rashdan bin Salleh, the Managing Director of the plaintiff, for a decision before the dispute is referred to arbitration in accordance with cls. 54(a) and (b) of the contract, is clearly in the form of a condition precedent to cl. 54(c).

[19] There is a discernible judicial trend in upholding preconditions or conditions precedent that parties have agreed before proceeding with arbitration. The outcome of such a precondition might be a reference to "mediation" or "negotiations in good faith" or "a resolution by the SO and his decision to be had first" or even to different "escalating tiers of meetings with representatives from both sides in terms of seniority" before arbitration is commenced. The rationale is not difficult to find. Arbitration has grown to be time-consuming and costly compared to litigation in jurisdictions where the courts are efficient. In our system where courts are enjoined to complete a trial within nine months of filing of the originating process, and where filing fees are a pittance compared to arbitrator's fees, it may well be a case where the cure through arbitration might well be worse than the disease. As such every incentive should be given especially where parties have bargained to explore other alternative means of dispute resolution before arbitration or litigation, that those alternative means should be exhaustively explored.

[20] I cannot appreciate how a reference to the SO wherein the contractor need to only wait for 45 days at most before proceeding with a notice of arbitration can derail or delay any resolution of a dispute longer than necessary before proceeding with arbitration.

[21] In fact, our courts have been more than ready to uphold a condition precedent clause as a precursor to be fulfilled before launching into an expensive litigation or even a more expensive arbitration; not to mention the protracted nature of such a mode of dispute resolution.

[22] Even when a litigation that has been commenced involving some parties who are not parties to an arbitration agreement, our court has not hesitated to require the parties who are parties to an arbitration agreement to comply with the precondition of negotiations before proceeding with arbitration. In this context, the judgment of the Court of Appeal in *Renault SA v. Inokom Corporation Sdn Bhd & Anor and Other Applications* [2010] 5 CLJ 32; [2010] 5 MLJ 394 at paras. 15-16 is especially relevant where it was, *inter alia*, observed as follows:

> [15] Whether or not there was a breach of the master agreement is certainly a dispute which falls squarely within the ambit of the arbitration agreement found in Article 11 of the master agreement which reads:
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> > All disputes arising from or in connection with the performance or interpretation of this Agreement shall be settled by the Parties through friendly negotiations between authorised representatives of the Parties. If an amicable solution cannot be reached between the Parties within two (2) months after the beginning of the said negotiations, such dispute shall be submitted to arbitration.
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> [16] The fact that Tan Chong and TC Euro have been named as alleged co-conspirators does not change the fact that a mechanism for resolving disputes between Renault, Inokom and Quasar has been agreed upon. Therefore, mechanism should be rightly invoked and the disputes resolved by arbitration and not by litigation in court. *The parties should honour Article 11 and give it life and meaning, to resolve disputes amicably. A devious attempt to circumvent Article 11, by instituting an action against Renault jointly with parties not subject to the arbitration clause, should not be encouraged.* (emphasis added)

[23] Likewise in *Total Future Sdn Bhd v. Government of Malaysia & Ors* [2013] 9 MLJ 288 at paras. 6, 10-14 the High Court held, *inter alia*, as follows:

> [6] The defendants, represented by counsel, Mr Taufik bin Mohd Yusoff and Mr McWillyn Jiok respectively, have disputed the claim, stating in the main that the plaintiff has been paid in full the differential sum in the prices of diesoline and is therefore estopped from claiming the difference, having signed the final certificate for payment. They have also contended in their defences that the plaintiff's action is premature for failing to refer the dispute on the said price of diesoline for arbitration as provided in cl. 2.37.2-2.37.3 of the special conditions of contract. The said clause reads:

A Precondition to Arbitration or Litigation 2.37.2

Unless and until a party has complied with the following conditions, notices and submissions that party may not with respect to any dispute or difference commence proceedings whether by way of litigation or arbitration.

B Notices and Submission 2.37.3

If any dispute or difference shall arise between the Employer and/or the engineer, and the Contractor, either during the progress or after completion of the Works, or after the determination of the Contractor's employment, or breach of this Contract, as to:

C (i) the construction of this Contract, or

(ii) any matter of thing of whatsoever nature arising under this Contract, or

(iii) ... then, subject nevertheless to Clause 2.33, such dispute or difference shall be decided as follows:

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(a) the Contractor shall, not later than fourteen (14) days after the dispute or difference arises, submit the matter at issue in writing, by hand or by AR Registered mail, specifying with detailed particulars the matter at issue (which in the case of claims covered by Clause 2.33 shall be limited to the particulars notified by the Contractor under that Clause), to the Engineer for decision, and the Engineer shall, as soon as practicable thereafter give his decision to the Contractor.

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(b) If the Contractor is dissatisfied with the decision given by the Engineer pursuant to (a) above, he may, not later than fourteen (14) days after the decision of the Engineer is given to him, submit the matter at issue in writing by hand or by AR Registered Mail specifying with detailed particulars the matter at issue, to the Employer for decision and the Employer shall, as soon as practicable thereafter, give its decision to the Contractor in writing

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PROVIDED that the detailed particulars of the matter at issue shall be limited to those particulars which the Contractor under (a) above.

(c) If the Contractor is, dissatisfied with the decision given by the Employer pursuant to (b) above, he may, not later than twenty-eight (28) days after the decision of the Employer is given to him, give notice in writing by hand or by AR Registered Mail to that effect.

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The parties shall then, within a further 28 days seek to agree upon a process of resolving the whole or part of the dispute or difference by means other than litigation or arbitration, and furthermore shall attempt to agree upon:

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(i) the procedure and timetable for any exchange of documentation and other information relating to the dispute or difference;

(ii) procedural rules and a timetable for the conduct of the selected mode of proceeding;

(iii) a procedure for the selection and compensation of a neutral person who may be employed by the parties for assisting in resolving the dispute; and

(iv) whether the parties should seek the assistance of a dispute resolution organisation.

[10] When I examined the said cl 2.37, though the clause and its sub-clauses deal with the pre conditions to starting 'litigation or arbitration' arbitration is indeed a mandatory dispute resolution in the agreement between the parties of 'the construction of the contract or any matter or thing of whatsoever nature arising under this contract' as per cl. 2.37.3(i)-(ii) because of the incorporation of cl. 43 of the general conditions of contract, one of the four documents forming the agreement between the parties. This clause is specifically mentioned in cl. 2.37.4 of the special conditions of contract and the relevant first part of that long clause is reproduced below. Clause 2.37.4 reads:

Notice of Reference to Arbitration 2.37.4

After the expiration of the time established by or agreed under Clause 2.37.3 for agreement on a dispute resolution process, any party which has otherwise complied with the provisions of this clause, may in writing delivered by hand or by AR Registered mail terminate the alternative dispute resolution process provided for and thereafter give notice to the other, party requiring the dispute or difference to be referred to arbitration, in accordance with clause 43. (emphasis added)

It shall furthermore be deemed to be agreed that the Arbitrator's jurisdiction in relation to the arbitration proceedings shall be limited to a determination of those matters which were identified in the original notice provided pursuant to Sub-Clause 2.37.3(a) and that in making his determination, the Arbitrator shall only be entitled to have regard to those particulars concerning the dispute provided pursuant to Sub-Clause 2.37.3(a) and it is further agreed that the party issuing the notice pursuant to Sub-Clause 2.37.3(a) shall be absolutely barred from raising or relying upon any particulars other than those provided in the notice issued pursuant to Sub-Clause 2.37.3(a).

[11] Clause 43 of the general conditions of contract reads as follows:

43. Provided always that in case any dispute or difference shall arise between the Employer or the Engineer on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith ..., then either party shall forthwith give to the other notice in writing of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be

A agreed upon between the parties in accordance with an subject to the provisions of the Arbitration Ordinance, and the award of such Arbitrator shall be final and binding on the parties. (emphasis added)

[12] Now when the said cl. 2.37.3 (quoted earlier) and 2.37.4 are read together with cl. 43, their combined effect makes it clear that arbitration B is a mandatory process for resolving the dispute of the parties as stated above and it cannot be denied that this claim for reimbursement of the difference in the price of diesoline comes within the ambit of the said cl. 2.37.3(i)-(ii).

[13] *What is even clearer is that the pre-conditions stated in 2.37.3 on the requirement to give notices and the timelines to do so stated in the said clauses are also mandatory to the dispute resolution of the parties' herein, whether arbitration or litigation is ultimately pursue.* The plaintiff's managing director ('WI') admitted in his evidence that no such notices were issued by the plaintiff. On this issue too, I was helpfully reminded by Mr Mohd Taufik, in his written D submission, of the Federal Court decision in *Morello Sdn Bhd v. Jacques (International) Sdn Bhd* [1995] 1 MLJ 577 where Edgar Joseph Jr FCJ held that for the purposes of construction of contracts the intention of the parties is the meaning of the words they have used. Hence, said His Lordship, the question to be answered always is 'what is the meaning of what the parties have said', and not 'what did the parties mean to say'.

E [14] When I posed that question in this case, *it is obvious that the parties have intended for these pre conditions as a precursor to the resolution of their dispute whether it be by arbitration or litigation and I could only give effect to it as they have so agreed.* I next consider the issue on estoppels. (emphasis added)

[24] As was clear in the above case, there was a two-tier reference, first to F the engineer and then to the employer for a decision of the dispute or difference before a reference to arbitration or litigation and the court had no problem keeping the parties to the bargain struck irrespective of what one party may now feel as being tedious and troublesome with little or no prospects of success in that if parties could resolve, they would have resolved G it by then without the need to go through the formalities of prior references again before resorting to arbitration or litigation as the case may be.

[25] As pointed out by the plaintiff, across the causeway in Singapore, the courts there have taken a similar approach. In the judgment of the Court of Appeal of Singapore, in *International Research Corp PLC v. Lufthansa Systems* H *Asia Pacific Pte Ltd and Another* [2014] 1 SLR 130 at paras. 7, 54-55, the Court of Appeal dealt with a multi-tier meetings escalating upwards where seniority of representatives from both sides are concerned and only if still unresolved, then only may the matter be referred for arbitration. Far from being uncertain and thus unenforceable, the Court of Appeal agreed with the High I Court that the clause was clear and certain and indeed mandatory and must be complied with by the parties as a condition precedent to arbitration. The Court of Appeal reasoned thus at paras. 7, 54-55 as follows:

7 The Cooperation Agreement contained a multi-tiered dispute resolution mechanism ("the Dispute Resolution Mechanism"), which was set out in cl. 37.2 read with cl. 37.3. Clause 37.2 states:

> 37.2 Any dispute between the Parties [ie, the Plaintiff and Datamat] relating to or in connection with this Cooperation Agreement or a Statement of Works shall be referred:
>
> 37.2.1 first, to a committee consisting of the Parties' Contract Persons or their appointed designates for their review and opinion; and (if the matter remains unresolved);
>
> 37.2.2 second, to a committee consisting of Datamat's designee and Lufthansa Systems' [ie, the Plaintiff's] Director Customer Relations; and (if the matter remains unresolved);
>
> 37.2.3 third, to a committee consisting of Datamat's designee and Lufthansa Systems' Managing director for resolution by them, and (if the matter remains unresolved);
>
> 37.2.4 fourth, the dispute may be referred to arbitration as specified in Clause 36.3 *[sic]* hereto.

Clause 37.2.4 refers incorrectly to cl. 36.3. The correct clause to refer to is cl. 37.3, which reads:

> All disputes arising out of this Cooperation Agreement, which cannot be settled by mediation pursuant to Clause 37.2, shall be finally settled by arbitration to be held in Singapore in the English language under the Singapore International Arbitration Centre Rules ('SIAC Rules'). The arbitration panel shall consist of three (3) arbitrators, each of the Parties has the right to appoint one (1) arbitrator. The two (2) arbitrators will in turn appoint the third arbitrator. Should either Party fail to appoint its respective arbitrator within thirty (30) days from the date of the last appointment of the two arbitrators, the arbitrators not so appointed shall be appointed by the chairman of the SIAC Rules within thirty (30) days from a request by either Party.

54 Before both the Tribunal and the High Court, the Plaintiff argued that the preconditions for arbitration in cl 37.2 of the Cooperation Agreement were unenforceable for uncertainty. *The Judge held that those preconditions were not uncertain and that cl 37.2 was enforceable (see the Judgment at [92]-[97]). The Plaintiff did not appeal against this finding of the Judge. In our judgment, this was well-advised because we agree with the Judge on this count, assuming that the objection which we have noted above (at [51]) can be overcome. The language of cl 37.2 was clear – it set out in mandatory fashion and with specificity the personnel from, the Plaintiff's side who were required to meet with Datamat's designees as part of a series of steps that were to precede the commencement of arbitration;* it further specified the purpose of each such meeting, which was to try to resolve any dispute that had arisen between the parties. We also agreed with the Judge's finding (see the Judgment at [100] that the steps set out in cl 37.2 were conditions precedent to any reference to arbitration pursuant to cl

37.3. Significantly, the arbitration clause itself in cl 37.3 refers only to "disputes ... which cannot be settled by mediation pursuant to Clause 37.2.

55 Finally, we noted that there was no suggestion that the Appellant had waived the preconditions for arbitration in cl 37.2. (emphasis added)

[26] There is a clear paradigm and indeed purposeful shift towards enforcing a precondition good faith negotiation and friendly discussion clause or even a mediation clause in resolving a dispute or difference that has arisen between the parties and a *fortiori*, when the precondition takes the form of a sieving mechanism of a definite reference to the SO for a decision before the parties launched into a full-blown arbitration or litigation, consuming in its wake much time and financial resources which would doubtless take a toll on the parties. Like all battles fought and won, even the winner is not without its casualties.

[27] This approach of the courts in its readiness to keep the parties to their contractual bargain of a precondition to meet to discuss and negotiate or mediate in good faith can be seen too in the English courts as illustrated in a more recent judgment of the High Court of England, in *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm) at para 42, 47, 50, 54, 57, and 64. The High Court there traced the initial reluctance of the courts to enforce such a clause and now see it additionally as consistent with public interest to uphold it:

42 In *United Group Rail Services Ltd v. Rail Corpn New South Wales* (2009) 127 Con LR 202 a contract for the design and build of rolling stock contained a dispute resolution clause which provided that the parties should "meet and undertake genuine and good faith negotiation with a view to resolving the dispute"; failing such resolution the dispute could be arbitrated. The New South Wales Court of Appeal held that the obligation to negotiate was enforceable. Allsop P carried out an extensive examination of the English and Australian authorities. He accepted that an agreement to agree was unenforceable but said that it did not follow that an agreement to undertake negotiations in good faith to settle a dispute arising under a contract was unenforceable.

...

47 This cogent reasoning can be applied to the present case as follows. *The clause in the present case obliged the parties to seek to resolve a dispute by friendly discussions and provided for four weeks to expire before arbitration could be commenced. Such an agreement is complete in the sense that no essential term is lacking. Since it is an obligation to seek to resolve a dispute arising under the LTC the discussions would concern the rights and obligations arising from the LTC with a view to reaching a compromise of the dispute which, reflects the existing bargain between the parties. There would not be an open-ended discussion concerning each party's commercial interests without regard to the rights and obligations under the LTC. Thus the agreement has sufficient certainty to be enforceable.* Whilst it may

be difficult in some circumstances to establish a breach of the obligation there will be other circumstances in which a court is likely to be able to identify conduct, if it exists, which departs from the conduct expected of parties who have agreed to seek to resolve contractual disputes by friendly discussions. For example, a party who refused to discuss his claim at all could easily be shown to have breached the obligation to seek to resolve his claim by friendly discussion. Difficulty of proof of breach in some cases does not mean that the clause lacks real content. If a party were to seek damages for breach of the obligation it might be difficult to establish what the outcome of the discussions would have been but in such a case damages could, in appropriate cases be awarded for loss of a chance. Concluding that the obligation was enforceable would be consistent with the public policy of encouraging parties to resolve disputes without the need for expensive arbitration or litigation.

...

50 However, where commercial parties have agreed a dispute resolution clause which purports to prevent them from launching into an expensive arbitration without first seeking to resolve their dispute by friendly discussions the courts should seek to give effect to the parties' bargain. Moreover, there is a public interest in giving effect to dispute resolution clauses which require the parties to seek to resolve disputes before engaging in arbitration or litigation.

...

54 Recent developments in the law of Singapore support this approach. In *International Research Corpn plc v. Lufthansa Systems Asia Pacific Pte Ltd* [2013] 1 Lloyd's Rep 24 the High Court of Singapore had to consider whether a clause which referred to arbitration disputes "which cannot be settled by mediation" provided for a condition precedent to arbitration which was too uncertain to be enforceable. The arbitral tribunal had held that it was. But the High Court held that it was enforceable. Reference was made to a decision of the Singapore Court of Appeal in *HSBC Institutional Trust Services (Singapore) Ltd v. Toshin Development Singapore Pte Ltd* [2012] 4 SLR 378 which concerned a contract which obliged parties to endeavour in good faith to agree a new rent. The *Walford* case [1992] 2 AC 128 was distinguished on the basis that that case concerned a stand alone agreement where there was no other overarching contractual framework which governed the parties' relationship.

...

57 It is also to be noted that (at least some) International Centre for Settlement of Investment Disputes ("ICSID") tribunals regard obligations to seek to resolve disputes by negotiation in good faith as binding and enforceable: see, for example, *Tulip Real Estate Investment and Development Netherlands BV v. Republic of Turkey* (ICSID Case No ARB/11/28) (unreported) 5 Marche 2012, paras. 56-72.

64 *In my judgment such an agreement is enforceable. My reasons (which largely echo those of Allsop P in the United Group Rail Services case) may be summarised as follows. The agreement is not incomplete; no term is missing. Nor is it uncertain; an obligation to seek to resolve a dispute by friendly discussions in good faith has an*

identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute. Difficulty of proving a breach in some cases should not be confused with a suggestion that the clause lacks certainty. In the context of a dispute resolution clause pursuant to which the parties have voluntarily accepted a restriction on their freedom not to negotiate it is not appropriate to suggest that the obligation is inconsistent with the position of a negotiating party. Enforcement of such an agreement when found as part of a dispute resolution clause is in the public interest, first, because commercial men expect the court to enforce obligations which they have freely undertaken and, second, because the object of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration. (emphasis added)

[28] The Australian courts too have demonstrated a distinct willingness to enforce preconditions to arbitration or litigation *via* some "genuine and good faith negotiations" clauses. The judgment of the New South Wales Court of Appeal, in *United Group Rail Services Limited v. Rail Corporation New South Wales* [2009] NSWCA 177 at paras. 70, 73, 78 to 81 is illustrative of this approach:

70 ... The content and context here is a clearly worded dispute resolution clause of an engineering contract. It is to be anticipated at the time of entry into the contract that disputes and differences that may arise will be anchored to a finite body of rights and obligations capable of ascertainment and resolution by the chosen arbitral process (or, indeed, if the parties chose, by the Court). The negotiations (being the course of treaty or discussion) with a view to resolving the dispute will be anticipated not to be open-ended about a myriad of commercial interests to be bargained for from a self-interested perspective (as in *Coal Cliff*). Rather, they will be anticipated to involve or comprise a discussion of rights, entitlements and obligations said by the parties to arise from a finite and fixed legal framework about acts or omissions that will be said to have happened or not happened. The aim of the negotiations will be anticipated to be to resolve a dispute about an existing bargain and its performance ...

...

73 These are not empty obligation; nor do they represent empty rhetoric. An honest and genuine approach to settling a contractual dispute, giving fidelity to the existing bargain, does constrain a party. The constraint arises from the bargain the parties have willingly entered into. It requires the honest and genuine assessment of rights and obligations and it requires that a party negotiate by reference to such.

78 This is a dispute resolution clause. To require in such a clause this degree of constraint on the positions of the parties reflects developments in dispute resolution generally. The recognition of the important public policy in the interests of the efficient use of public and private resources and the promotion of the private interests of members of the public and the commercial community in the efficient conduct of dispute resolution in litigation, mediation and arbitration in a fair, speedy and cost efficient manner attends all aspects of dispute resolution: cf "just, quick and cheap resolution of the real issues": Civil Procedure Act 2005 (NSW), s. 56. Parties are expected to co-operate with each other in the isolation of real

issues for litigation and to deal with each other in litigation in court in a manner requiring co-operation, clarity and disclosure: see for example *Baulderstone Homibrook Engineering Pty Ltd v. Gordian Runoff Limited* [2008] NSWCA 243 at [160]-[165] and *Bellevarde Constructions Pty Ltd v. CPC Energy Pte Ltd* [2008] NSWCA 228 at [55]-[56]. As part of its procedure, the Court can order mediation: Civil Procedure Act, s 26. Section 27 of that Act states that it is the duty of each party to the proceedings that have been referred to mediation to participate "in good faith" in the mediation. Costs sanctions can attend this duty cf *Capolingua v. Phylum Pte Ltd* (1991) 5 WAR 137.

79 The contract here is, of course, not one governed by the Civil Procedure Act. It is, however, a modern contract with a sophisticated and detailed dispute resolution clause seeking to employ various tools to resolve disputes. The definition of "Law" in cl 2.2 makes clear that the law of New South Wales (and, implicitly, the common law of Australia) is the proper law of the contract. One of the available tools of dispute resolution is the obligation to engage in negotiations in a manner reflective of modern dispute resolution approaches and techniques – to negotiate genuinely and in good faith, with a fidelity to the bargain and to the rights and obligations it has produced within the framework of the controversy. This is a reflection, or echo, of the duty, if the matter were to be litigated in court, to exercise a degree of co-operation to isolate issues for trial that are genuinely in dispute and to resolve them as speedily and efficiently as possible.

80 *The public policy in promoting efficient dispute resolution, especially commercial dispute resolution, requires that, where possible, real and enforceable content be given to clauses such as cl 3 at para 5.11 and 35.12 to encourage approaches by, and attitudes of, parties conducive to the resolution of disputes without expensive litigation, arbitral or curial.*

81 *The business people here chose words to describe the kind of negotiations they wanted to undertake, "genuine and good faith negotiations", meaning here honest and genuine with a fidelity to the bargain. That should be enforced. In my view, subcl 35.11(c) was not uncertain and had identifiable content.* (emphasis added)

[29] Thus where there is a sufficiently clear reference to the SO for a decision before proceeding to arbitration as in the nature of a precondition or condition precedent, both the intention of the parties as captured in the clear words of cl. 54(a) and (b) as well as public interest would operate to constrain the courts to enforce such a clause.

Whether The Various Correspondences Between The Parties And In Particular The Letter From The Defendant To The Plaintiff Dated 3 September 2010 Is Sufficient Substantial Fulfilment Of The Condition Precedent Before Reference To Arbitration As Required Under Clause 54(a) And (b) Of The Contract

[30] The reference by the contractor to the SO for a decision of the differences or disputes must be a reference of sufficient particularities addressed to the SO such that anyone reading the said reference in writing would know clearly that it is a reference under cl. 54(a) of the contract,

calling for a decision in writing within 45 days of the reference. It is a reference with a request for a decision because there is a time frame for the SO to revert in writing with his decision, failing which consequences ensue. If the SO does not reply in writing within 45 days of the reference, then the contractor may proceed with arbitration within 45 days thereafter. If the arbitrator does reply in writing, then the contractor may proceed with arbitration before the expiry of 45 days from the date of receipt of the written decision. Without knowing which letter is a reference under cl. 54(a), there will be the corresponding difficulty as to when reference to arbitration ought to be made. Parties must be deemed to have prized promptness in proceeding with the next stage of dispute resolution *via* arbitration by agreeing to the timeline set, quite apart from the fact that such a timeline may or may not be binding on the parties as may be held by the court.

[31] Whilst appreciating that substance must prevail over form, one must ask whether there is a semblance of sufficient compliance with substance in all the circumstances of the case in the correspondence referred to by the contractor. I can do no better than to reproduce the commentary by the learned author, Lim Chong Fong, now a Judicial Commissioner, in his commentary on the PWD 203 contract in *The Malaysia PWD Form of Construction Contract* (2nd edn, Sweet & Maxwell Asia 2011) at p 154 with respect to cl. 54 as follows:

> *The arbitration agreement herein provides a two tier process in that it is a condition precedent that any dispute or difference must be first referred to the Officer Named for a decision before the dispute or difference can be referred to arbitration.* Though not expressed, it is submitted that the referral to the Officer Named can be made during the progress or after completion of the Works, or after the termination of the Contract. The referral can be made either by the Contractor or the Government so long as a dispute or difference has arisen between them. A dispute or difference arises when a claim is represented by one party and it is rejected by the other (see *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd* [1991] 3 CLJ 2400 and *Gadang Engineering (M) Sdn Bhd v. Bluwater Developments Bhd* [2010] 5 AMR 41; [2010] 6 CLJ 277).
>
> *The referral to the Officer Named must be made in clear terms to invoke the first of the two tier process, preferably quoting this clause in the referral* (see *Penta Ocean Construction v. Penang Development Corporation* [2003] 2 AMR 311). (emphasis added)

[32] Therefore in determining whether the referrals by way of letters written to try to resolve the dispute or difference are sufficient compliance with cl. 54(a) and (b), one must be confined to the letters written before the reference to arbitration *via* the notice to arbitrate. One must bear in mind that what is in issue here is whether a precondition or a condition precedent has been fulfilled and obviously any fulfilment of such a condition must be with reference to actions before the notice to arbitrate and not after. Letters after the said notice to arbitrate and meetings held pursuant to such letters would not be relevant.

[33] In particular, the defendant through its learned counsel Encik Mohd Irzan Iswatt, referred to its letter dated 3 September 2010 as amounting to a referral of disputes or differences to Dato' Dr Sr Kamarul Rashdan for a decision in accordance with cl. 54 of the contract. See affidavit of Mohd Zahari affirmed on 12 February 2016, paras. 14 to 15. The full contents of the defendant's letter dated 3 September 2010 are as follows:

Rujukan Kami: AB/Zila/2010/0278

Tarikh: 3hb September 2010

USAHASAMA SPNB-LTAT SDN BHD

Tingkat 10, Bangunan MAS
Jalan Sultan Ismail
50250 Kuala Lumpur
U/p: Yg. Bhg. Prof. Dr. Sr. Kamarul Rashdan Hj Salleh

Cadangan Pembangunan Perumahan Untuk Anggota-anggota Tentera Dan Kakitangan Awam Di Lembah Kelang – Kem Sungai Besi (Pakej 5A)

- "Draft of final Account Statement"

Dengan hormatnya surat USUSGBS(5A)/1/35/JId.5/CAD(25) bertarikh 12hb Ogos 2010 berkenaan perkara di atas adalah dirujuk.

Untuk makluman pihak Yg. Bhg. Prof, penamatan kontrak kami adalah tidak sah kerana kelewatan siap kerja adalah berpunca daripada:

1) Masalah Pembayaran

   Kelewatan siap kerja adalah berpunca daripada masalah pembayaran bukannya disebabkan kegagalan kami menjalankan kerja-kerja kontrak secara gigih dan berterusan. Seperti yang pihak SPNB-LTAT sedia maklum, kami tetap meneruskan kerja-kerja di tapak walaupun aliran tunai projek terjejas berikutan pembayaran yang diterima dari pihak SPNB-LTAT adalah "under payment" iaitu sejak bulan Mac 2006, di mana perbezaan di antara pencapaian fizikal dengan kewangan adalah sebanyak 15% atau RM9.0 juta. Di samping itu juga, aliran tunai projek turut terjejas berikutan kegagalan pihak Yg. Bhg. Prof. menjelaskan bayaran sejak bulan Ogos 2007 sehingga Februari 2008. Perkara ini telah kami maklumkan melalui surat kami ABI/HZ/2008/128 bertarikh 25hb Februari 2008

2) Lanjutan Masa (Extension of Time)

   Bilangan hari yang diluluskan oleh pihak SPNB-LTAT adalah tidak setara dengan bilangan hari yang dipohon. Pihak SPNB-LTAT juga telah menolak tuntutan Lanjutan Masa No. 5 dan 6 yang dipohon pada Oktober dan November 2007.

   (Rujuk Lampiran A)

Di sini, kami juga ingin menyatakan bahawa kami tidak bersetuju terhadap bayaran muktamad yang diperakukan iaitu berjumlah (RM4,224,317.83). Ini berasaskan kepada faktor-faktor berikut yang tidak diambil kira:

A a. Kerja-kerja tambahan (Variation Order)

Jumlah keseluruhan tuntutan ke atas kerja-kerja tambahan adalah sebanyak RM3,323,978.79. Jumlah yang diperakukan di dalam penyata akaun muktamad hanya RM1,578,250.00. Baki tuntutan berjumlah RM1,745,728.79 tidak dipertimbangkan di dalam penyata akaun muktamad tersebut.

B b. Kerja-kerja membaik pulih (Rectification Works)

Jumlah keseluruhan tuntutan ke atas kerja-kerja membaik pulih adalah sebanyak RM5,979,016.70. Jumlah yang diperakukan di dalam penyata akaun muktamad hanya RM1,756,971.11. Baki tuntutan berjumlah RM4,222,045.59 tidak dipertimbangkan di dalam penyata akaun muktamad tersebut.

C c. Nilai kerja dilaksanakan (Work Done)

Nilai keseluruhan kerja-kerja yang telah dilaksanakan tidak termasuk kerja-kerja tambahan dan membaik pulih adalah sebanyak RM50,322,130.13 (Rujuk Lampiran A). Jumlah yang diperakukan di dalam penyata akaun muktamad hanya RM45,562,801.06. Baki tuntutan berjumlah RM4, 759,329.07 tidak dipertimbangkan di dalam penyata akaun muktamad tersebut.

D d. Wang Jaminan Perlaksanaan (Bank Guarantee)

E Tuntutan ke atas wang jaminan perlaksanaan berjumlah RM3,240,625.00. Pihak SPNB-LTAT tidak wajar menuntut wang perlaksanaan ini berikutan penamatan kontrak adalah tidak sah.

4. Ganti rugi tertentu dan ditetapkan (Liquidated and Ascertained Damages)

F Berikutan penamatan kontrak kami adalah tidak sah, kami tidak bersetuju terhadap ganti rugi tertentu yang dikenakan berjumlah RM4,798,800.00.

G Berdasarkan keterangan di atas, kami berharap pihak Yg. Bhg. Prof. dapat mempertimbangkan faktor-faktor tersebut dalam penyediaan perakuan akaun dan bayaran muktamad. Berdasarkan pengiraan kami, baki tuntutan kami adalah berjumlah RM14,611,750.62 (Rujuk lampiran B).

Kerjasama dan perhatian dari pihak Yg. Bhg. Prof. amat kami hargai.

Sekian, terima kasih.

H Yang benar,

AB1 CONSTRUCTION SDN BHD

t.t.

....

I Dato' Mohd Zahari Abd. Rahman
Pengarah Urusan

s.k Akitek Jururancang (M) Sdn. Bhd. – En. Ahmad Nazran Yahya
Ranhill Consulting Sdn. Bhd. – Pn Mariah Kadir
Zakaria-Lee dan Partners Sdn. Bhd – Mr Chua Gaik Hwee

[34] Whilst one can surmise the issues that had been raised by the defendant, the thrust of the letter is not for a decision of the SO but an expression of its dissatisfaction over the final accounts as derived and determined by the SO. It is an appeal to the SO to revisit such a determination by taking into consideration the various factors raised by the defendant. Such a letter falls short of a reference under cl. 54(a) of the contract. There must be sufficient specificity with reference to the disputes or differences and an invocation of the said clause calling for nothing short of a decision. Politeness of language is no substitute for a plain and pointed reference for a decision under cl. 54(a).

[35] In the judgment of the Court of Appeal of Singapore, in *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and Another* [2014] 1 SLR 130 at paras. 56-62, the Court of Appeal could not agree with the High Court that the various rounds of meetings held to resolve the disputes or differences was a sufficient compliance with the multi-tiered reference to negotiations as found in the precondition clause to arbitration. The Court of Appeal explained as follows:

> Compliance
>
> Actual compliance
>
> 56 When it came to deciding whether cl 37.2 had been satisfied on the evidence before him, the Judge referred to a table produced in an affidavit affirmed on 17 July 2012 by Oliver Marissal, who was the Plaintiff's chief financial officer at the material time. This table ("the Table"), the Judge noted, showed at least seven meetings between the Appellant and the Plaintiff in Bangkok from February 2007 to July 2009 (see the Judgment at [110]). The Judge concluded (likewise at [110] of the Judgment) that given the many rounds of meetings between the parties, "the object of cl 37.2" (emphasis added) had been met.
>
> 57 We respectfully disagree with the Judge on this point. In our judgment, from a perusal of the Table, it would have been apparent that cl 37.2 had not been satisfied. In our judgment, what was contemplated under cl 37.2 was that any dispute would be escalated up the hierarchies of the respective parties with representatives of increasing seniority to meet to attempt resolution. The Table showed that a mix of various apparently random meetings had been held. However, our scrutiny of the Table and of the personnel who attended those meetings revealed that the precise persons required to be involved pursuant to the cl 37.2 process were not so involved (at least where the Plaintiff was concerned). For example, cl 37.2 envisaged the involvement of the Plaintiff's "Director Customer Relations" (see cl 37.3.3), and then its "Managing Director" (see cl 37.2.3). Yet, from the Plaintiffs side, none of these personnel who had been designated or specified in cl 37.2 ever participated in the meetings with the Appellant.
>
> 58 Aside from this, it was not altogether clear just what had been discussed at these meetings. The Judge did not think that this was problematic because he "[had] not seen any evidence from [the Appellant]

A that the [p]ayment [d]ispute was never discussed or sought to be resolved at these meetings" (see the Judgment at [110]). With respect, there was no basis for placing the burden of proof on this issue upon the Appellant. It was the Plaintiff which invoked the Dispute Resolution Mechanism and which, therefore, had to assert and prove compliance with the preconditions for arbitration. This, it did not do.

B

Substantial compliance

59 The Judge appeared to have been persuaded that the conditions precedent in cl 37.2 had been satisfied because its "object" (see the Judgment at [110]) had been met. In this regard, the Judge applied the English High Court decision of *Halifax Financial Services Ltd v. Intuitive Systems Ltd* [1999] 1 All ER (Comm) 303 ("*Halifax Financial*"), which was cited to him and also to us. Mr Dhillon submitted that *Halifax Financial* stood for the proposition that it was sufficient for the Plaintiff to have complied "in substance" with the procedure set out in cl 37.2. Therefore, it was argued, despite some shortcomings in what in fact might have been done, the conditions precedent to the commencement of arbitration should be found to have been fulfilled because their object, namely, to attempt and endeavour to address the dispute between the Appellant and the Plaintiff at the respective parties' senior management levels with the aim of resolving such dispute, had been satisfied.

C

D

60 *Halifax Financial* concerned an interlocutory appeal where, in respect of the claim brought by the Defendant, the Defendant sought a declaration that the court did not have jurisdiction because there was alleged noncompliance with a dispute resolution clause. There, the dispute resolution clause ("cl 33.1") read as follows (see *Halifax Financial* at 305):

E

> 33.1 In the event of any dispute arising between the Parties in connection with this agreement, senior representatives of the Parties will, within 10 Business Days of a written notice from either Party to the other, meet in good faith and attempt to resolve the dispute without recourse to legal proceedings.

F

Meetings were held between the representatives of the parties, but these were not, expressly labelled "cl 33.1 meetings". McKinnon J held that cl 33.1 prescribed an optional contractual procedure, rather than a mandatory one which had to be complied with before legal proceedings could be brought. Clause 33.1 was thus found not to be a condition precedent to the commencement of legal proceedings. Having decided the matter on this basis, McKinnon J went on to express doubts over the enforceability of cl 33.1, although he also opined that it had been satisfied on the facts. McKinnon J thought that even though the meetings between the parties had not been labelled "cl 33.1 meetings", both parties had been represented at those meetings by the appropriate "senior representatives" (see *Halifax Financial* at, *inter alia*, 309) in their respective organisations. He therefore considered that cl 33.1 had been satisfied.

G

H

I

61 Two points are noteworthy. First, cl 33.1 in *Halifax Financial* was in much more general terms than cl 37.2 of the Cooperation Agreement in the present case. There is none of the specificity that is inherent in the latter, which envisages, with precision, an escalation of a dispute by way

of progressively higher ranks of the Plaintiff's management meeting with their designated counterparts from the other side in an endeavour to reach a resolution. Second, it is clear that McKinnon J in *Halifax Financial* would not have concluded as he did had the appropriate "senior representatives" not taken part in the meetings. On this basis, *Halifax Financial* did not support Mr Dhillon's submission that substantial compliance of a condition precedent would be sufficient. In fact, *Halifax Financial* appears to have been decided on the basis that there had been actual compliance with cl 33.1, the only drawback being that the meetings between the parties had not been labelled as having been held pursuant to that clause. To this extent, the case is uncontroversial, although it is also unhelpful to the Plaintiff.

62 *Where the parties have clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, those preconditions must be fulfilled. In the case before us, it could not be said that the parties intended that some meetings between some people in their respective organisations discussing some variety of matters would be sufficient to constitute compliance with the preconditions for arbitration.* This can be seen from among others, the decision of the United States Court of Appeals for the Seventh Circuit in *DeValk Lincoln Mercury, Inc, Harold G DeValk and John M Fitzgerald v. Ford Motor Company and Ford Leasing Development Company* 811 F 2d 326 (7th Circuit, 1987) (more commonly cited as "*DeValk Lincoln Mercury, Inc v. Ford Motor Company*"). That was a case involving a motion by the defendants for summary judgment upon the plaintiffs' failure to comply with a pre-litigation mediation clause. The court rejected the plaintiffs' argument that they had substantially complied with the clause on the basis that they had met the purpose of that clause, which, it was argued, was to give the defendants notice of a potential claim and to allow the defendants to attempt to settle the claim prior to litigation. *The reasoning in that case is consistent with our own view that where a specific procedure has been prescribed as a condition precedent to arbitration or litigation, then absent any question of waiver, it must be shown to have been complied with.* (emphasis added)

[36] The Singapore Court of Appeal concluded as follows at para 63:

63 Given that the preconditions for arbitration set out in cl. 37.2 had not been complied with, and given our view that they were conditions precedent, the agreement to arbitrate in cl 37.3 (even if it were applicable to the Appellant) could not be invoked. The Tribunal therefore did not have jurisdiction over the Appellant and its dispute with the Respondent ...

[37] I would similarly hold that the various letters and chiefly the letter of 3 September 2010 reproduced above, from the defendant addressed to the plaintiff instead of to the SO and captioned "Draft of Final Account Statement" do not come close to being a specific reference under cl. 54(a) of the contract though one by reading it, might have a rough idea as to the nature of the dispute. The defendant did impress upon the plaintiff why the termination of the contract is invalid and that it was not agreeable to the draft final account but fell short of invoking cl. 54(a) in requiring the SO to make a decision within 45 days of the reference to him.

[38] Evidence of a series of meetings and negotiations between the parties is not tantamount to a reference under cl. 54(a) of the contract. I cannot agree more with the *dicta* of the High Court, in *Penta-Ocean Construction Co Ltd v. Penang Development Corporation* [2003] 1 LNS 8; [2003] 2 AMR 311 at p. 322 where it was held as follows:

> I hold that:
>
> (a) even if the letter of 22.8.97 is taken to be the Defendant's decision, it is not material because the time bar in Clause 54 is not predicated on the date of the Defendant's decision, but on the date of the reference of the dispute by the Plaintiff to the SO and the date of the SO's decision;
>
> (b) I further hold that the letter of 17.9.97 does not constitute a reference by the Plaintiff to the SO for a decision, rather the Plaintiff was seeking to negotiate further with the Defendant when it said:
>
> > ... Accordingly we would request that you arrange for a further meeting with the client in order to discuss and finally resolve the long outstanding claim matters urgently.
>
> (c) *I find that since the Plaintiff's letter of 17.9.97 did not constitute a reference to the SO, then the SO's response thereto by way of its letter of 19.9.97 could not be a decision within the meaning of Clause 54.*
>
> (d) *In any event, the contents of the letter of 19.9.97, whereby the Plaintiff was requested to reconsider its position and accept the offer made earlier by the Defendant clearly cannot amount to a decision of the SO.* (emphasis added)

Whether The Plaintiff Has Waived The Precondition Of A Reference Of The Dispute To The SO Before The Defendant Proceeded To Arbitration

[39] The defendant relied on various correspondences and contended that the action by the defendant to bring the disputes to arbitration had never been opposed, objected to or refuted by the plaintiff and hence constituted a waiver on the part of the plaintiff towards the precondition stipulated in cl. 54 of the contract. The Court of Appeal's decision in *Araprop Development Sdn Bhd v. Leong Chee Kong & Anor* [2008] 1 CLJ 135; [2008] 1 MLJ 783 is instructive in cases where it is argued that there has been a waiver. It was observed as follows:

> Waiver and/or estoppels
>
> [32] The last issue raised by the appellant in this appeal was waiver and/or estoppel. The appellant submitted that under the S&P, delivery of vacant possession on the land was to have been on or before 15 March 1999 and time was made the essence. The appellant submitted that the Plaintiffs elected to keep silent when the delivery of vacant possession was not effected on 15 March 1999. On the other hand, the Plaintiffs continued to pay the quit rent for the years 1999 and 2000 which were their obligations under the S&P. It was further submitted by the appellant that the Plaintiffs waited for two years and three months before issuing

the purported notice of termination which was dated 30 June 2001. The appellant contended that the act of the Plaintiffs constituted a waiver and/or gives rise to an estoppel and cited *Cheah Koon Tee v. Crimson Development Sdn Bhd* [1999] MLJU 108; *Sim Chio Huat v. Wong Ted Fui* [1983] 1 MLJ 151 and *Charles Richards Ltd v. Oppenheim* [1950] 1 All ER 420.

[33] In reply, the Plaintiffs submitted that they had never indicated to the appellant that it was acceptable to the Plaintiffs that the appellant fulfilled its promise of the delivery of vacant possession at a later date other than that stipulated by the S&P. Silence and time having passed by themselves are not evidence of a waiver. The Plaintiffs then cited *Sakinas Sdn Bhd v. Siew Yik Hau & Anor* [2002] 5 MLJ 497 and *Tai Kim Yew & Ors v. Sentul Raya Sdn Bhd* [2004] 4 MLJ 227. The Plaintiffs further submitted that the relevant period for the court to look into the conduct of both parties was between the completion date (15 March 1999) to the termination date (30 June 2001). During this period the Plaintiffs did not take any step which could even remotely be said to amount to a waiver save as to pay the quit rent (a statutory payment) which the appellant might have refused to pay whereby opening the Plaintiffs to sanctions by way of fines, etc. For that reason, the Plaintiffs had no choice but to make those payments. Anyway, the Plaintiffs did not play an active role in the payment of quit rent because the quit rent was paid by the appellant on behalf of the Plaintiffs to the local authorities as it is based on the master title which has yet to be sub-divided. Further, it was MBSB who was charged by the appellant for the payment of the quit rent. The appellant did not adduce any other evidence which could be constituted as a waiver or estoppel on the part of the Plaintiffs.

[34] The Plaintiffs did not dispute the fact that they did nothing when the date for delivery of vacant possession came into being. The appellant termed this as silent on the part of the Plaintiffs. *Silence by itself could not be interpreted as a waiver. It does not mean anything unless there is additional factor which together with the silence could be interpreted or inferred as a waiver and/or estoppel as seen in Sim Chio Huat v. Wong Ted Fui where in allowing the time to pass and keeping silent to the repudiation and also the fact that the Plaintiff had asked the appellant to do extra works during that period would as a whole tantamount to a waiver and/or estoppel. In the present appeal, except for the silence, the Plaintiffs did nothing at all. As such, I am of the view that there is no act on the part of the Plaintiffs which could be constituted as a waiver or estoppel.* (emphasis added)

[40] In further support of the above proposition, the plaintiff relied on the judgment of the High Court, in *Eagle Eye Capital Sdn Bhd v. Roselina Tan Sri Mahmood* [2011] 1 LNS 234 at p. 7 where it was held as follows:

I have considered the competing contentions of both parties. It appears to this Court that a reading of the Letter of Advance clearly contemplates that the Definitive Agreements were to be executed within 45 days of drawdown. It is not in dispute that the drawdown was effected as set out above. Therefore time began to run from that date and expired 45 days later, at the end of March 2009. The breach therefore occurred in or around early April. *The fact that the Plaintiff did not act on the breach until 16*

A *months later does not appear to amount to a waiver of that breach or to making time 'at large' because there was no indication either by act or word from the Plaintiff to the Defendant indicating that the Plaintiff was according the Defendant further time to procure the execution of the Definitive Agreements. Mere silence does not amount to waiver. It requires some encouragement from the Plaintiff, to the effect that the Defendant is given time indefinitely, before it can be concluded that time became*
B *'at large'. In other words, I do not accept the contention put forward by the Defendant that by waiting for 16 months, the Plaintiff had waived the breach or placed time 'at large' such that the 45 day time limit ceased to be of any effect.* The reality is that the breach occurred and nothing was done by the plaintiff to acquiesce or extend time again. In these circumstances the defendant's contention that the Plaintiff's claim is premature and that the Defendant
C needs to be accorded reasonable notice again, is untenable. (emphasis added)

[41] What is more relevant and determinative is that s. 18(3) of the Arbitration Act 2005 provides as follows:

D (3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.

[42] There can be no estoppel as against a statute. See the case of *JMB Silverpark Sdn Bhd v. Silverpark Sdn Bhd & Anor* [2012] 1 LNS 1082; [2013] 9 MLJ 714 at p. 726. In *United Malayan Banking Corporation Sdn Bhd v.*
E *Syarikat Perumahan Luas Sdn Bhd* [1998] 3 MLJ 352b Edgar Joseph Jr J (as he then was) at p. 356 held: "The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute." Much earlier in *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1963] 1 LNS 61; [1964] 1 MLJ 49 Viscount Radcliffe, Privy Council, at p. 54 had affirmed
F that "... a party cannot set up estoppels in the face of a statute ..." Here the plaintiff had raised the jurisdictional challenge at the first preliminary meeting and in the circumstance it was timeously and promptly raised.

[43] The learned authors Sundra Rajoo & WSW Davidson in *The Arbitration Act 2005* (Sweet & Maxwell Asia 2007) at p. 89 have addressed
G this issue of whether there could be a waiver when a jurisdictional challenge was raised within the timeline stated under s. 18(3) of the Arbitration Act 2005:

18.14 To ensure that objections are raised without delay section 18(3) and (5) establish two different time limits for raising the pleas. The plea
H that the arbitral tribunal has no jurisdiction shall be raised no later than the submission of the statement of defence. The Plaintiff may not invoke lack of jurisdiction after submitting its statement of defence unless the arbitral tribunal considers the delay justified and admits a later plea. With respect to a counterclaim, it is submitted that the relevant cut-off point would be the time at which the Defendant submits its reply. A plea that
I the arbitral tribunal had exceeded the scope of its authority has to be raised as soon as the matter which is alleged to exceed this authority is dealt with in the arbitral proceedings. However, the applicant party must include in its application all of the grounds of jurisdictional challenge known to it (see *Westland Helicopters Ltd v. Sheikh Salah Al-Hejailan* [2004] EWHC 1625 (Comm)).

18.15 The failure to raise a plea as to the arbitral tribunal exceeding the scope of its mandate would not necessarily preclude raising such a plea in setting aside or in recognition and enforcement proceedings as section 37(1)(a)(iv) and (v) of the act permits the setting aside of the award on these grounds. See commentary at paragraph 37.11 below.

18.16 *Section 18(3) to (6) does not state what the consequences of failure to raise a plea of no jurisdiction are. However, section 7 which deals with waiver of the right to object, does not apply in this case because section 18 is not a provision from which the parties may derogate (section 7(a)).* (emphasis added)

[44] This court would agree with the above analysis.

Pronouncement

[45] The defendant was anxious that limitation might have set in bearing in mind s. 30 of the Limitation Act 1953. This court appreciates the anxieties assailing the defendant. The plaintiff's counsel was agreeable that limitation should not run during the period of reference to the SO. Therefore this court in ruling that the arbitrator has no jurisdiction until compliance with cl. 54(a) and (b) PWD 203 contract, would also hold that time does not run with respect to the Limitation Act 1953 from the date the application on this preliminary issue was made before the arbitrator on 2 June 2015 until the expiry of the two tranches of 45 days referred to in cl. 54(c) PWD Contract provided that the relevant notice under cl. 54(a) is issued by the claimant to the plaintiff herein within 14 days from today. If need be, the claimant/defendant may have to resort to s. 45 of the Arbitration Act 2005 with respect to applying to the High Court for an extension of time to commence the arbitration.

[46] The appeal was allowed with the directions and rulings as abovestated.

[47] The court also ordered costs of RM4,000 to be paid by the defendant herein to the plaintiff. Allocator to be paid before extraction of order of costs.